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IN THE

Supreme Court of the United States

October Term, 1948.

No. ~~783~~. 69

JESSE MILLER SINCLAIR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DAVID BERGER,
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INDEX TO PETITION.

	Page
Petition for Writ of Certiorari to the United States Court of Appeals, for the Third Circuit	1
A. Statement of the Case.	2
B. The Questions Presented	2
C. Reasons Relied on for Allowance of the Writ	3

INDEX TO BRIEF IN SUPPORT OF PETITION.

Pag

Argument .....

I. Petitioner's Letter to His Wife Was a Confidential Communication and Hence Absolutely Privileged .....

II. The Letter Written to and Received by Petitioner's Wife Is Not Obscene, Lewd or Lascivious Within the Meaning of 18 U. S. C. A. Section 1461....

III. Application of the Statute to This Letter Between Husband and Wife Is an Invasion of Petitioner's Right of Freedom of Speech Guaranteed by the First Amendment 12

Conclusion 14

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TABLE OF CASES CITED.

Page

Dunlop v. U. S., 165 U. S. 486, 17 S. Ct. 380, 41 L. ed. 799 12
Dysart v. U. S., 272 U. S. 655, 71 L. ed. 461, 47 S. Ct. 234 10
Hanegan v. Esquire, 327 U. S. 146, 66 S. Ct. 456 13
Lanham v. Lanham, 105 Texas 91, 145 S. W. 336 ... 5
Leach v. Carlile, 258 U. S. 138, 42 S. Ct. 227, 66 L. ed. 511 13
McKie v. State, 165 Ga. 210, 140 S. E. 625 6
Near v. Minnesota, 283 U. S. 697, 51 S. Ct. 625 14
New York Life Ins. Co. v. Ross, 30 F. 2d 80 (CCA 6); cert. denied 279 U. S. 852 6
Roth v. Goldman, 172 F. 2d 788 10
Swearingen v. U. S., 161 U. S. 446, 16 S. Ct. 562, 40 L. ed. 765 ..... 7, 10
Taylor v. State of Mississippi, et al., 319 U. S. 583, 63 S. Ct. 1200 13
Thomas v. Collins, 323 U. S. 516, 65 S. Ct. 315 14
U. S. v. Barlow, 56 F. Supp. 795 (D. C. Utah), appeal dismissed, 323 U. S. 805, 65 S. Ct. 25, 89 L. ed. 642 12
U. S. v. C. I. O., 335 U. S. 106, 68 S. Ct. 1349 14
U. S. v. Dennett, 39 F. 2d 564 (C. C. A. 2) 11
U. S. v. Levine, 83 F. 2d 156 (C. C. A. 2) 11
U. S. v. Limehouse, 285 U. S. 424, 52 S. Ct. 412, 76 L. ed. 843 9
U. S. v. Mitchell, 137 F. 2d 1006 (C. C. A. 2) 6
U. S. v. Musgrave, 160 Fed. 700 14
U. S. v. One Book Entitled Ulysses, 72 F. 2d 705 (C. C. A. 2) 11
U. S. v. Reinheimer, 233 Fed. 545 14
U. S. v. Wroblenski, 118 Fed. 495 (D. C. Wis.) 11, 14
Walker v. Popenoe, 149 F. 2d 511 (App. D. C.) 11
Winters v. N. Y., 333 U. S. 507, 68 S. Ct. 665 14
Wolfle v. United States, 291 U. S. 7, 78 L. ed. 617, 54 S. Ct 279 ..... 3, 6

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Act of March 4, 1909, Chap. 321, 35 Stat. at L. 1088, 1129, 18 U. S. C. A. Section 334	8
43 Cong. Record, Part 1, p. 284	8
The Criminal Code, Section 211, as Amended, 18 U. S. C. A. Section 1461	1, 2, 7
8 Wigmore on Evidence, (3d ed.) pp. 640 et seq.	5
8 Wigmore on Evidence, (3d ed.) Secs. 2331, 2334 and 2341	6
U. S. Constitution, First Amendment	13

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Supreme Court of the United States.

OCTOBER TERM, 1948.

No. .

JESSE MILLER SINCLAIR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Jesse Miller Sinclair, respectfully prays that a *writ of certiorari* issue to review the decision of the United States Court of Appeals for the Third Circuit, in a *per curiam* opinion affirming the Judgment of the Eastern District of Pennsylvania convicting petitioner of a violation of Section 211 of The Criminal Code, as amended, 18 U. S. C. A. Section 1461.

Petitioner was sentenced to imprisonment for one year and a day following his conviction by the Trial Judge sitting without a jury. Applications for bail were denied by the District and Circuit Courts. Petitioner has been imprisoned since March 21, 1949, date of his conviction. The opinion and mandate of the Court of Appeals were filed on May 5, 1949.

A.

STATEMENT OF THE CASE.

Petitioner was indicted on September 8, 1948, charged with knowingly depositing for mailing an obscene, lewd and lascivious letter dated July 14, 1948. The letter was sent to Petitioner's wife (R. 3a) whom he had been seeing weekends (R. 7a). It was turned over to the Postal Inspector by petitioner's wife (R. 8a) and she initiated a complaint against him (R. 9a). The letter is set forth at page 16a of the Record.

B.

THE QUESTIONS PRESENTED.

The following questions arise as a result of the action of the trial court as affirmed by the Court of Appeals:

(1) Can a confidential communication between a husband and wife be the basis for a prosecution and conviction of a spouse for violation of the Postal Laws?

(2) Is a letter from a husband to his wife disclaiming responsibility for her illness and charging it to her sexual misconduct with other men "obscene, lewd or lascivious" within the meaning of 18 U. S. C. A. Section 1461?

(3) Does the application of the statute making it a criminal offense for a husband to mail such a sealed letter to his wife constitute an unreasonable control of the post and a violation of petitioner's right of freedom of speech guaranteed by the First Amendment?

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C.
REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

In the decision sought to be reviewed the Court of Appeals has decided an important question of federal criminal law with a *per curiam* two sentence opinion citing no authority (no opinion was filed by the District Court) in a way probably in conflict with the decision of your Honorable Court in *Wolfle v. United States*, 291 U. S. 7, 78 L. ed. 617, 54 S. Ct. 279, which upholds the immunity from disclosure of a confidential communication between spouses and its use for convicting the sender-spouse who had not previously disclosed the letter; the Court of Appeals has decided an important federal question involving the meaning of the obscenity statute in a way probably in conflict with the decisions of the Second Circuit recognizing the doctrine of privileged use of the mails protecting against criminal prosecution those who might, by literal application of the Statute, otherwise be guilty of violating it. The decision sought to be reviewed invades petitioner's constitutional rights protected under the First Amendment. There is nothing dangerous in the sending of such a letter by a husband to his wife which can or should be forbidden by the State (there is no publication), and certainly there is no clear and present danger to our government or its institutions which could justify such censorship of the mails.

If the decision sought to be reviewed is permitted to stand it will mean that no husband who believes his wife has committed serious sexual misconduct with other men could write to her in *non-legal terms* without subjecting himself to federal criminal prosecution for mailing an *obscene* letter.

WHEREFORE, your petitioner respectfully prays that a *writ of certiorari* be issued out of and under the seal of this Court directed to the Court of Appeals for the Third Circuit, commanding that Court to certify and send to this

Court for its review a full and complete transcript of the record of all proceedings in this suit, proceeding or matter, and to stand to and abide by such order and direction as this Court shall deem meet under the circumstances of the case, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem just and proper.

Dated May 12, 1949.

JESSE MILLER SINCLAIR,
Petitioner.

By DAVID BERGER,
JACOB KOSSMAN,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION.

ARGUMENT.

I.

Petitioner's Letter to His Wife Was a Confidential Communication and Hence Absolutely Privileged.

The communication in this case was a handwritten letter by the husband to his wife and opened by her (R. 4a).

There can be no doubt of its purely personal, confidential character. Counsel for the respondent conceded this in the Court below; there is therefore no need to rely upon the presumption that all marital communications are confidential. 8 *Wigmore on Evidence,* (3d Ed.) pp. 640-641.

The expression in the letter "Have you told your family how many men . . . " does not mean that the wife is to show *this letter* to her family. It asked petitioner's wife a question, and is obviously an attempt by a husband to shift the responsibility for his wife's illness. It is not a direction either express or implied, to reveal the contents of the letter itself. Merely because a husband writes to his wife reproaching her for misconduct does not detract from the confidential character of the communication nor deprive it of the privilege which protects against its disclosure without the sender's consent. *Lanham v. Lanham,* 105 Texas 91, 145 S. W. 336.

The problem of the effect of confidential communications coming into the possession of a third person surreptitiously does not arise in the instant case because the evidence reveals that the letter was turned over by petitioner's wife to a postal inspector (R. 9a). Obviously a letter obtained from the addressee-spouse by voluntary delivery is still privileged else the privilege could, by collusion, be practically nullified for written communications. 8 *Wig-*

more on Evidence (3rd Ed.) Page 655. *McKie v. State*, 165 Ga. 210, 140 S. E. 625; *New York Life Ins. Co. v. Ross*, 30 F. 2d 80 (CCA 6); cert. denied 279 U. S. 852.

In *Wolfle v. United States*, 291 U. S. 7, 78 L. ed. 617, 54 S. Ct. 279, a case involving the *use of the mails* to defraud, in which a husband dictated a letter to his stenographer and, after transcription, sent it to the wife, this Court stated:

> "The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails."

In the instant case the communicating spouse made no voluntary disclosure of the letter to a third person. Hence, it remains privileged.

This privilege is regarded even more highly than that causing disqualification of a spouse from testifying against the other spouse. Marital disqualification ceases upon death or divorce of one spouse; the privilege protecting communications between husband and wife extends even after death or divorce of either. 8 *Wigmore on Evidence*, (3d ed.) Secs. 2331, 2334 and 2341; see *U. S. v. Mitchell*, 137 F. 2d 1006 (C. C. A. 2).

None of the exceptions recognized by the common law (where the husband is indicted for a crime against his wife) are here applicable. In this case, petitioner is charged with violating the postal laws. He was neither indicted nor tried for committing a crime against his wife. He did not commit any crime against her.

Consequently, the letter was privileged and could not be the basis for either a prosecution or conviction of petitioner.

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II.

The Letter Written to and Received by Petitioner's Wife Is Not Obscene, Lewd or Lascivious Within the Meaning of 18 U. S. C. A. Section 1461.

There is a clear cut distinction between obscene matter which is non-mailable because it is "obscene, lewd or lascivious" and that which is barred because it is "filthy." The statute as originally enacted barred only "obscene, lewd or lascivious" matter. In *Swearingen v. U. S.*, 161 U. S. 446, 16 S. Ct. 562, 40 L. ed. 765, this Court held that by the three words Congress meant to convey only one thought. The Court stated:

> "The offense aimed at, in that portion of the statute we are now considering, was the use of the mails to circulate or deliver matter *to corrupt the morals of the people.* The words 'obscene', 'lewd' and 'lascivious', as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. *As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.* Referring to this newspaper article, as found in the record, it is undeniable that its language is exceedingly coarse and vulgar, and as applied to an individual person, plainly libelous. But we cannot perceive in it anything of a lewd, lascivious and obscene tendency, *calculated to corrupt and debauch the mind and morals of those into whose hands it might fall.*" (Emphasis supplied.)

In the *Swearingen* case the asserted non-mailable matter was a newspaper article which described a certain person as a "red headed mental and physical bastard that flings filth under another man's name" and as one who would sell his mother's honor and "pimp and fatten on his sister's shame with as much unction as a buzzard gluts in

carrion", as one who was known as the companion of strumpets, who had "reveled in lowest debauches," and otherwise called the person a coward, liar, pimp, poltroon, and one who could be easily bought.

This Court held the language not obscene, lewd or lascivious within the meaning of the Act. It should be noted that an obscene libel at common law involved publication. In this case there is present simply a private communication between husband and wife.

By the Act of March 4, 1909, chap. 321, 35 Stat. at L. 1088, 1129, 18 U. S. C. A. Section 334, the words "and every filthy" were added to the Act. The legislative history of this amendment reveals that *another and new class of nonmailable matter was intended by the use of this phrase.* (See 43 Cong. Record, part 1, p. 284):

> "Mr. Moon of Pennsylvania. Mr. Chairman, one word on behalf of the committee. I have no doubt Congress originally intended to create two distinct classes of nonmailable matter by the existing section. Indeed, the decision of the circuit court prior to the time of the Swearingen case had defined the word 'obscene,' or 'obscenity,' as that form of indecency which is calculated to promote the general corruption of morals. They had defined lewdness and lasciviousness as that form of immorality which has respect to sexual impurity. However, that distinct classification was overturned by the Supreme Court decision in the Swearingen case, which decided that owing to the juxtaposition of the words 'obscene,' 'lewd,' and 'lascivious' Congress had created but one class. Therefore feeling that Congress originally intended to create these two distinct classes of prohibition, on behalf of the committee I am entirely willing to put this language in the form offered by the gentleman from Tennessee (Mr. Houston), *which I think does create another class and a class that the department informs*

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us it is very necessary should be excluded from the mails." (Emphasis supplied.)

In *U. S. v. Limehouse,* 285 U. S. 424, 426, 52 S. Ct. 412, 76 L. ed. 843, the defendant was charged with the unlawful deposit of "a certain filthy letter and writing." Interpreting the Act, Justice Brandeis stated:

"The letters contain much foul language; charged the addresses or persons associated with them with sexual immorality, and in some cases charged miscegenation and similar practices. They were coarse, vulgar, disgusting, indecent; and unquestionably filthy within the popular meaning of that term. On the ground that no letter was obscene, lewd or lascivious within the meaning given to those terms in Swearingen v. U. S., 161 U. S. 446, 16 S. Ct. 562, 40 L. ed. 765, the District Court sustained a demurrer and quashed the indictment. . . . In Swearingen v. United States, decided in 1896, the indictment was under Revised Statutes, Section 3893, U. S. C. Title 18, Section 334, which made unmailable only 'obscene, lewd or lascivious' matter. This Court, being of opinion that those words should be given the meaning attributed to them at common law in prosecutions for criminal libel, directed that the judgment of conviction be reversed, because the language used was not 'calculated to corrupt and debauch the mind and morals of those into whose hands it might fall' and induce sexual immorality. 161 U. S. at 451, 40 L. ed. 766, 16 S. St. 562. The indictment here under review contains no reference to 'obscene, lewd or lascivious'. The charge is of depositing 'a certain filthy letter'. It is brought under the amendment to Section 3893 of the Revised Statutes made by Section 211 of the Criminal Code, Act of March 4, 1909, Chap. 321, 35 Stat. at L. 1088, 1129, U. S. C. Title 18, Section 334, which inserted the words 'and every filthy'. Now the clause reads 'every obscene, lewd or lascivious, and every filthy book, ... letter.'

> 'The Lower Court failed to recognize that the amendment introduced, not merely a word, but a phrase. Disregarding the collocation of the words, it treated the amended clause as if it had read 'obscene, lewd, lascivious, or filthy'; and then, applying the doctrine of noscitura sociis, gave to 'filthy' the meaning attributed in the Swearginen case to the words 'obscene, lewd, or lascivious'. Thus, the Court emptied the amendment of all meaning. We think that it is a more natural reading of the clause to hold that by the amendment, Congress added a new class of unmailable matter,—the filthy . . ."

It is thus clear that the Court has sharply differentiated between language that is obscene, lewd, or lascivious and language which is filthy. *Hence, an indictment charging the depositing of an obscene, lewd or lascivious letter cannot be sustained by proof of a letter that is filthy but not obscene, lewd or lascivious.*

The test whether a letter is obscene, lewd or lascivious is: does the language used have a tendency to deprave and corrupt the morals of those whose minds are open to such influences by arousing and implanting therein obscene, lewd or lascivious desires and by inducing sexual immorality? *Swearingen v. U. S., supra; Dysart v. U. S.*, 272 U. S. 655, 71 L. ed. 461, 47 S. Ct. 234. Merely because it may be difficult to determine whether a particular writing is obscene or filty (*Roth v. Goldman*, 172 F. 2d 788 (C. A. 2)) cannot justify the ignoring of this distinction.

In the instant case there is nothing in the letter that would incite or excite sexual desires or passions in the wife-addressee nor was that the intent of the writer. This letter may be abusive, insulting and one that would arouse the indignation, anger and resentment of the recipient, but not sexual passions or desires. Quite the contrary. The reading of this letter instead of debasing the morals of the decent, correct and moral minded would have the very op-

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posite effect. The letter is a bitter, perhaps indelicate, complaint by a husband to his wife. *But two words do not make a letter of over one hundred words obscene, lewd or lascivious.* See *Walker v. Popenoe,* 149 F. 2d 511 (App. D. C.): "The statute does not bar from the mails an obscene phrase or sentence." It cannot be that the writer of a letter containing two monosyllabic words to his wife and never meant to be an obscene publication is to be condemned as a criminal, while authors of hundreds of books that freely circulate in this country and contain the very same words or expressions are immune from prosecution because the writings are considered literature. The Act makes no distinction between literary and non-literary publications. It is the courts that have construed the statute so as not to apply to writings *even though they contain the very words used in this letter,* if the primary purpose of the writer is not to deprave and corrupt the morals by arousing and implanting obscene, lewd or lascivious thoughts and desires.

In determining whether a writing is obscene, it is necessary to consider the sender-addressee relationship. The same writing mailed to one addressee could correctly be considered obscene; yet if mailed to a different person, it could not. *U. S. v. Dennett,* 39 F. 2d 564 (C. C. A. 2); *U. S. v. Levine,* 83 F. 2d 156, 158 (C. C. A. 2); *cf. U. S. v. One Book entitled Ulysses,* 72 F. 2d 705, 708 (C. C. A. 2).

In *U. S. v. Wroblenski,* 118 Fed. 495, (D. C. Wis.) it was held that the mailing of a private, sealed letter by a son to his mother charging her with adulterous intercourse with a son-in-law, did not constitute the mailing of a letter containing "obscene, lewd and lascivious" language. The court therein stated "It is atrocious in spirit, and indecedent in the plain implication of the language. . . . The language or communication may be free from the condemnation of the statute in one instance, while it would clearly fall within it when addressed to other persons. *So the inquiry as to the tendency of the letter must be narrowed to its liability to corrupt the addressee and no such tend-*

ency can be imputed to this letter to the mother of the defendant." (Emphasis supplied.)

In *Dunlop v. U. S.*, 165 U. S. 486, 500, 501, 17 S. Ct. 380, 41 L. ed. 799, this Court stated . . . "whereas the true test of what constitutes obscene literature is that which tends to deprave the morals in one way only, namely, by exciting sexual desires and lascivious thoughts."

In *U. S. v. Barlow*, 56 F. Supp. 795 (D. C. Utah), appeal dismissed, 323 U. S. 805, 65 S. Ct. 25, 89 L. ed. 642, the court stated: "In conclusion, it might be said that the natural reaction to reading a publication setting forth that polygamy is essential to salvation is one of repugnance and does not tend to increase sexual desire or impure thoughts. We must also bear in mind that one cannot pick up a national magazine, or go to the theatre or movie without being confronted with illustrations and advertisements that tend more to incite sexual desire than do any of the publications in this magazine that have been called to our attention. In fact, sexual excitement is a selling point of innumerable publications and advertisements that pass without comment or prosecution."

It is clear that obscenity is measured by erotic allurement. The matter must suggest impure or libidinous thoughts and invite to lewd and lascivious practices and conduct, must create a desire for gratification of animal passions, must encourage unlawful indulgence of lust, or attempt to satisfy the morbid appetite of the salacious.

Measured by these criteria, it must be held that appellant's letter to his wife is not obscene, lewd or lascivious.

III.

Application of the Statute to This Letter Between Husband and Wife Is an Invasion of Petitioner's Right of Freedom of Speech Guaranteed by the First Amendment.

The statute as construed in this case makes it a criminal offense to communicate by mail to one's wife and punishes the petitioner although what he has communicated is not

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claimed or shown to have been done with an evil or sinister purpose. There is nothing dangerous in the sending of such a sealed letter by a husband to his wife which can or should be forbidden by the State. The policy of the law has always been to *protect* confidential communications between spouses. Certainly, there is no showing of a clear and present danger to our government or its institutions which could justify such censorship of the mails with the imposition of criminal sanctions. *Taylor v. State of Mississippi, et al.,* 319 U. S. 583, 63 S. Ct. 1200.

Justice Holmes dissenting in *Leach v. Carlile,* 258 U. S. 138, 140, 42 S. Ct. 227, 228, 229, 66 L. ed. 511, stated: ". . . and notwithstanding all modern inventions letters still are the principal means of speech with those who are not before our face. I do not suppose that anyone would say that the freedom of written speech is less protected by the First Amendment than the freedom of spoken words. . . . The question is only whether it may make possible irreparable wrongs and the ruin of a business in the hope of preventing some cases of a private wrong that generally is accomplished without the aid of the mail. Usually private swindling does not depend upon the post office. If the execution of this law does not abridge freedom of speech I do not quite see what could be said to do so . . . But when habit and law combine to exclude every other it seems to me that the First Amendment in terms forbids such control of the post as was exercised here. I think it abridged freedom of speech on the part of the sender of the letters and that the appellant had such an interest in the exercise of their right that he could avail himself of it in this case."

See Justice Frankfurter concurring in *Hanegan v. Esquire,* 327 U. S. 146, 66 S. Ct. 456, who cited with approval the dissent of Justice Holmes in *Leach v. Carlile,* 258 U. S. 138, 140, 42 S. Ct. 227, 228, 229, 66 L. ed. 511, as "to the extent to which the First Amendment forbids control of the post so far as sealed letters are concerned . . ."

Petitioner submits that the First Amendment forbids control of the post so far as this sealed letter from a husband to his wife is concerned. Certainly, there is here no clear and present danger either to the morals of the public or the institutions of our government. The identity of the interest of husband and wife, so long recognized, negatives the concept of that publication which is indispensable to the constitutionality of this criminal statute. Any attempt to restrict appellant's liberties as guaranteed by the First Amendment "must be justified by clear public interest, threatened not doubtfully or remotely but by clear and present danger." *Thomas v. Collins,* 323 U. S. 516, 528, 65 S. Ct. 315, 322. No such clear public interest justifies the invasion of petitioner's freedom of speech and right of privacy by the application of criminal sanctions against him. *U. S. v. C. I. O.,* 335 U. S. 106, 68 S. Ct. 1349; *Near v. Minnesota,* 283 U. S. 697, 51 S. Ct. 625; *Winters v. N. Y.,* 333 U. S. 507, 68 S. Ct. 665.

CONCLUSION.

In the last analysis, the decision sought to be reviewed shockingly denounces as criminal the sending of a confidential communication by a husband to a wife, thus overturning in a most dangerous way, a long standing rule of privilege. If not for privilege, the very Court officials who in the course of official business mail official documents (exhibits, etc.) in obscenity statute prosecutions would be subject to the same severe criminal penalties as petitioner. Significantly, *not one appellate decision can be found to support this result.* A case of first impression in the appellate courts has been decided with but a two sentence *per curiam* opinion without a citation to answer the important federal questions involved.

The very lack of authority for prosecuting a spouse[1]

1. Compare the following District Court decisions: *U. S. v. Wroblewski,* 118 Fed. 495 (letter from son to mother); *U. S. v. Musgrave,* 160 Fed. 700 (letter from husband to wife); *U. S. v. Reinheimer,* 233 Fed. 545 (letter from sender to himself).

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who mails a confidential letter to the other spouse under these circumstances indicates that those responsible for the administration of federal criminal justice have hitherto rejected such prosecutions. To uphold this conviction will open the door of the federal courts to thousands upon thousands of cases essentially involving domestic disputes; and there is no suggestion that state courts are incapable of coping with that problem.

Respectfully submitted,

David Berger,
Jacob Kossman,
Counsel for Petitioner.